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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 463

ANNA H. MORGAN,

Appellant,

vs.

STATE OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR APPELLANT

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* After the indictment in this case, the Ohio laws were revised and the Ohio General Code became the Ohio Revised Code, with each section being renumbered. Because some changes were also made in statutory language in the Revised Code, this brief uses General Code section numbers and language.

IN THE SUPREME COURT OF THE UNITED STATES

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No. 463

ANNA H. MORGAN,

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vs.

STATE OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of Judge Bryant of the Court of Common Pleas of Franklin County, Ohio, Criminal Division, overruling appellant's demurrer to the indictment was filed October 13, 1953 (R. 9-36). Appellant was tried, without a jury, November 16, 1953. Judge Gessaman, of the Court of Common Pleas of Franklin County, Ohio, rendered his decision on May 3, 1954, together with a written opinion (R. 86-92). The Court of Appeals of Franklin County, Ohio, affirmed the judgment without opinion November 1, 1954 (R. 96). None of these opinions is reported.

The first opinion of the Ohio Supreme Court was rendered on February 23, 1956 (R. 103-131), and is reported at 164 O.S. 529, 133 N.E.2d 104. The dissenting opinion of

Justice Hart (R. 131-136) is reported at 164 O.S. 556-561. The opinion of Justice Stewart, dissenting in part (R. 136-139), is reported at 164 O.S. 561-564. The dissenting opinion of Justice Taft (R. 139-141) is reported at 164 O.S. 564-566.

Following this Court's per curiam opinion of June 24, 1957, at 354 U.S. 929 (R. 146-147), remanding the case to the Ohio Supreme Court, that Court rendered a brief per curiam opinion on February 11, 1958 (R. 148-149), Justice Taft dissenting (R. 149), reported at 167 O.S. 295, 147 N.E.2d 847.

Jurisdiction

The judgment of the Supreme Court of the State of Ohio (R. 148-149) was entered on February 11, 1958 (R. 148-149). Appellant's application for rehearing was denied on March 5, 1958 (R. 145). The notice of appeal to this Court was filed in the Supreme Court of Ohio on April 29, 1958 (R. 145). On October 20, 1958, this Court entered an order granting leave to proceed in forma pauperis and an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits, immediately following argument in *Raley, et al.* v. *State of Ohio,* Oct. Term 1958, No. 175.

The jurisdiction of this Court rests on 28 U.S.C., Sec. 1257(2).

This Court has jurisdiction to hear an appeal testing the constitutionality of a state statute establishing a legislative investigation committee in the field of "subversive activities". *Uphaus* v. *Wyman,* Oct. Term 1958, No. 34, 356 U.S. 926.

This Court has jurisdiction to hear an appeal testing the constitutionality of a state statute or constitutional provision abridging First and Fourteenth Amendment freedom

of thought and association by coercing persons into refraining from proscribed speech and association. *Speiser* v. *Randall*, 357 U.S. 513; *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449.

This Court has jurisdiction to hear an appeal testing whether the method established in a state statute or constitutional provision for determining the political beliefs and affiliations of a person is fair or whether it constitutes a denial of due process of law under the Fourteenth Amendment. *Speiser* v. *Randall*, cited *supra*, at 520.

This Court has jurisdiction to review convictions for contempt of state legislative investigating committees in order to determine whether a witness was deprived of due process of law under the Fourteenth Amendment. *Sweezy* v. *New Hampshire by Wyman*, 354 U.S. 234.

And this Court has jurisdiction to determine whether the separation of the power of a state legislature to conduct investigations from the responsibility to direct the use of that power causes a deprivation of the constitutional rights of individual witnesses and a denial of due process under the Fourteenth Amendment. *Sweezy* v. *New Hampshire by Wyman*, cited *supra*.

Constitutional Provisions and Statutes Involved

United States Constitution:

Article I, Section 8, Sub-section (1)

"The Congress shall have power:

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;".

Article I, Section 10, Sub-section (1)

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Article II, Section 2, Sub-section (1)

"The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Article VI, Sub-section (2)

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes of Ohio:

The primary statute involved is the act establishing the Un-American Activities Commission of Ohio, Sec. 76-28 to 76-35, General Code, reproduced in the Appendix, *infra*.

G.C. Sec. 12845. Refusing to testify before general assembly or a committee thereof.

Whoever, having been subpoenaed or ordered to appear before either branch of the general assembly, or before a standing or select committee of the general assembly, or either branch thereof, fails so to do, or, having appeared, refuses to answer a question pertinent to the matter under inquiry, or to produce, upon reasonable notice, books, papers or documents in his possession or under his control, pertinent thereto, shall be fined not less than one hundred dollars nor more than five thousand dollars.

G.C. Sec. 60. Testimony before committee not to be used in criminal prosecution of witness; exception.

Except as to a person who, in writing, requests permission to appear before such committee or sub-committee or who, in writing waives the rights, privileges and immunities granted by this section, the testimony of a witness examined before a committee or sub-committee shall not be used as evidence in a criminal proceeding against him, nor shall a person be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies, or produces evidence, documentary or otherwise; but nothing herein shall exempt a witness from the penalties of perjury.

Questions Presented

(1) Whether the statute establishing the Un-American Activities Commission of Ohio is repugnant to the United States Constitution because:

(a) The state has no power to act in national and international affairs, or in the field of subversion, which Congress has fully occupied;

(b) The Commission's investigation of the political beliefs, associations and activities of private citizens necessarily abridged their constitutionally protected freedoms;

(c) The requirement that the Commission "disclose" all persons and groups having certain objectives serves no valid legislative purpose and pins a "badge of disloyalty" on individuals, without due process of law;

(d) The language of the statute is vague;

(e) The vague grant of authority to the Commission made it impossible for a reviewing court to judge whether the Commission had ranged outside the area committed to it by its parent assembly, and insulated the Assembly from the witnesses subjected to the sanctions of compulsory process.

(2) Whether the Ohio immunity act, as interpreted by the Supreme Court of Ohio, is repugnant to the United States Constitution because:

(a) The act displaces the right of a witness to refuse to answer questions on the ground of self-incrimination when the answers could become the basis for prosecution in the federal jurisdiction, which is coterminous with state jurisdiction;

(b) The act, as interpreted and applied, permits a witness to be convicted of contempt for refusal to answer questions which he was not directed to answer, and without instructing him that he is clothed with immunity from state prosecution;

(c) The act is applied to the Un-American Activities Commission, although, by its terms, it can only be applied to a "committee of the General Assembly", which the Commission was not.

(3) Whether appellant was denied due process of law under the Fourteenth Amendment by conviction for wilful refusal to answer 32 questions pertinent to the matter under inquiry, when:

(a) The evidence does not support a finding that appellant wilfully refused to answer the questions;

(b) The evidence does not support a finding that the questions asked were pertinent to the matter under inquiry;

(c) The evidence supports a finding that appellant was asked only one question, and that in an area protected by the First and Fourteenth Amendments, and outside the jurisdiction of the State of Ohio.

Statement of the Case

In March, 1951 the Ohio General Assembly, by joint resolution, established a Joint Committee on Subversive Activities (R. 39). The Committee held hearings until, in June, 1951, the 99th Ohio General Assembly established the Ohio Un-American Activities Commission by passage of Senate Bill 358, approved by the Governor (becoming Sec-

tions 76-28 to 76-35, Ohio General Code). (See Appendix, *infra*.)

The Commission was given the power and charged with the duty:

"(1) To investigate, study and analyze

(a) all facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means;

(b) all facts concerning persons, groups and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government or the industrial potential of this state;

(c) the operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated above and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

(2) To maintain a liaison with any agency of the federal, state or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage or threats of the same."

The statute creating the said Commission was passed at the close of the session of the 99th General Assembly. The Commission therefore came into being and operated after the *sine die* adjournment of the parent legislative body (R. 47).

The Un-American Activities Commission held public hearings from January, 1952 until the end of March, 1952, calling persons who testified at length as cooperative witnesses, including Harvey Matusow.[1] On March 31, 1952, hearings were held in Columbus, Ohio at which one John DeLong testified at length. He described his relationship with the appellant, Anna Morgan, told where she lived, stated that she was a member of the Communist Party and active in its organizational work (R. 60-62).

On the next day, April 1, 1952, the Commission continued its Columbus hearings by calling four witnesses pursuant to subpoenas. The first three witnesses appeared without counsel. They were the first witnesses called before the Commission who refused to answer any of its questions.

The year was 1952. Several cases were pending in state and federal courts concerning the rights of a witness before a legislative investigating committee, and it was common knowledge that witnesses were refusing to answer questions based on their "privilege against self-incrimination under the Fifth Amendment." This Court had not yet reviewed any contempt convictions resulting from legislative investigations into the political beliefs and affiliations of witnesses appearing under compulsory process.[2]

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[1] See discussion of this witness in *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 126.

[2] This Court decided the *Nelson* case in January 1954, and the *Emspak*, *Bart* and *Quinn* cases, 349 U.S. 190, 219 and 155, in May 1955. *Yates, et al.* v. *United States*, 354 U.S. 98, and *Watkins* v. *United States*, 354 U.S. 178 and *Sweezy* v. *New Hampshire*, 354 U.S. 234, were decided in June 1957.

Several state and federal prosecutions were pending against leaders of the Communist Party.[3]

The April 1, 1952 hearing opened with the swearing of one Robert E. L. Terrill, who appeared without counsel. Mrs. Morgan, appellant herein, was present throughout Mr. Terrill's testimony (R. 62). No preliminary statement was made by the Commission as to the purpose of the hearing, and "No fixed rules for the conduct of hearings were determined at any time or adopted by the Commission" (R. 40).[4]

The witness declined to answer any of the questions asked of him by counsel for the Commission. Mr. Renner, a Cincinnati attorney serving as Speaker of the House of Representatives of the Ohio Assembly, served as chairman of the Commission. At the conclusion of the questioning by Commission counsel, Mr. Renner said to the witness:

> "Mr. Terrill, you have the right to refuse to answer any question, the answer to which might incriminate you. Otherwise, you are required under the law to answer the questions that are put to you by this Commission which is a Commission constituted by the people of Ohio to make a study of Communism, and un-American Activities in Ohio" (R. 62).

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[3] Within months after this hearing, Communist Party leaders were indicted under the Smith Act in Cleveland, Ohio. *United States* v. *Brandt, et al.*, 256 F. 2d 79. And see cases listed at I CIVIL LIBERTIES DOCKET 3, at #110.1, and at 5, at #130.1; and II CIVIL LIBERTIES DOCKET 6-7, at #241 and #244, including federal Smith Act prosecutions, and prosecutions under state anti-sedition statutes. In at least one instance, in the neighboring state of Pennsylvania, a group of Communist Party leaders were concurrently defendants in federal Smith Act and state anti-sedition act proceedings. Ohio has long had a criminal syndicalist law, Ohio Gen. Code Sec. 13421-23 to -26, similar to the Pennsylvania act involved in *Pennsylvania* v. *Nelson*, 350 U.S. 497.

[4] Testimony of Gordon Renner, Chairman of the Ohio Un-American Activities Commission, at trial of appellant.

Called as the second witness, appellant also appeared without counsel (R. 60). Appellant was a private citizen. She had never been employed by the State of Ohio. She was not a member of any trade union using the facilities of a state or federal labor board. She was not connected with any state or federal educational institution. She was in no sense a public figure.

Questioning of appellant by counsel for the Commission began, without any preliminaries (R. 49). She was sworn and gave her name. Appellant was asked where she lived. She answered:

> "I regret that I cannot answer your question under the Fifth Amendment of the Constitution, because to do so would give your Committee an opportunity to incriminate me" (R. 49).

Appellant, asked to explain how answering this question would tend to incriminate her, stuck rigidly to the formula of words she had first used. Chairman Renner then said:

> "Mrs. Morgan, are you aware of the fact that your failure to answer questions—some questions of this Commission, might also tend to put you in an embarrassing situation?
>
> "Mrs. Morgan: I still appeal under the Fifth Amendment of the Constitution and the Bill of Rights.
>
> "Chairman Renner: I simply want to apprise you of your duties as well as your rights. Counsel may proceed" (R. 50).

Counsel then asked appellant a long series of questions, starting with her length of residence in Franklin County and her place of employment, but mainly directed to whether she was now or had ever been a member of the Communist Party and what her activities in the Communist Party had allegedly been. As to each question, appellant declined to

answer on the basis of her privilege against self-incrimination. The questions dealt with Mrs. Morgan's activities in Franklin County, starting with January 9, 1949. The Commission counsel framed his questions to indicate that he merely wanted confirmation of information already in his files. For example:

> "I will ask you, Mrs. Morgan, if it is not a fact that on May 9, 1949, at a regular meeting of the Communist Party of Franklin County you announced that you and your husband might have to leave Columbus because your salary had not been paid and your husband at that time had no job?" (Now Count 14 in the indictment, R. 53.)

After the twelfth question by counsel, and appellant's repeated reference to the Fifth Amendment privilege, Chairman Renner said:

> "Mrs. Morgan, I should like to advise you under the Fifth Amendment, you are permitted to refuse to answer questions that might tend to incriminate you.
>
> "Mrs. Morgan: Yes.
>
> "Chairman Renner: But you are not permitted to refuse to answer questions simply for your own convenience. Counsel may proceed" (R. 52).

The 47 questions were directed mainly at the subject matter allegedly discussed at meetings of the Communist Party of Franklin County (Counts 10, 15, 18 in the indictment, R. 52-53), including its financial problems (Counts 11, 13, 14, R. 52-53), its organizational problems (Counts 22, 23, 24, 27, R. 54), and the condemnation of segregation of Negro members (Count 18, R. 53).

Following her refusal to answer each question, counsel proceeded to ask the next question. No directions to answer were given.

"It was the policy of the commission not to press questions which we felt would be of an incriminating nature. For instance, whenever a witness was asked a question—, * * * —are you or have you ever been a member of the Communist Party, and if the witness refused to answer that question, we did not press it. * * * " (R. 137).[5]

At the conclusion of the questioning, the Commission read into the record a statement allegedly handed to the chairman by appellant. In the statement, appellant described herself as "an average American housewife. Daughter of a deacon, I early was baptized in a Congregational Church. I accepted its teaching of the brotherhood of man for every day in the year, not just for Sunday. * * * " She then set forth her opinions on a number of subjects then in the news, including the Commission, and explained why she would not answer its questions (R. 57-59).

After the hearing, and without any action by the Ohio General Assembly, then in recess, appellant was indicted because she did "wilfully refuse to answer" 37 questions "pertinent to the matter under inquiry" before a "select committee of the General Assembly," under Sec. 12845 Genl. Code (quoted *supra*).[6] The trial court over-ruled appellant's demurrer (R. 9-36).

On January 1, 1953, the Commission, appointed by the 99th General Assembly, filed its Report with the 100th

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[5] Testimony of Gordon Renner, *supra* note 4, in the companion case of *Raley, et al.* v. *Ohio*, No. 175 October Term 1958.

[6] The statute establishing the Un-American Activities Commission of Ohio provided a procedure for punishing refusals to answer questions before this Commission. Sec. 76-32 Genl. Code (reprinted in the Appendix). Appellant was not indicted under this Section. *Raley, et al.*, in the companion case referred to in note 5, were indicted under Sec. 76-32 Genl. Code.

General Assembly.[7] The Commission believed that it was necessary to continue to investigate "un-American activities." But it was aware of the widespread criticisms of its procedures. It therefore recommended that a special assitant attorney general be put in charge of subversive activities and that he turn over to county grand juries the evidence he collected, so that, where the evidence warranted, prosecutions could be brought for violation of the anti-sedition laws of Ohio.[8] "Undoubtedly, this will do much to satisfy those persons opposed to public hearings, because the traditional secrecy which normally surrounds grand jury proceedings will cloak these hearings as well, and only such matters as the grand juries choose to report upon will become public records."[9]

The Commission assumed that approximately nine months would elapse between the filing of its recommendations and the effective date of the new legislation. It therefore recommended that its own life be extended for one year,[10] but "Unique in the field of legislative committees, this Commission set its own death date and recommended its functions be absorbed by the Attorney General of Ohio."[11]

The 100th General Assembly did pass the legislation recommended by the Comission. The Governor (now Senator) Lausche vetoed one of the measures (perhaps because

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[7] The Report is referred to at R. 48. Report of the Un-American Activities Commission, State of Ohio, 1951-1952, dated January 1, 1953. Hereafter referred to as 1953 Report.

[8] *Ibid.*, at 36.

[9] Report of the Un-American Activities Commission, State of Ohio, 1953-1954, dated January 31, 1954, at 25. Hereafter referred to as 1954 Report.

[10] 1953 Report, at 35.

[11] 1954 Report, at 9.

of the pendency of *Pennsylvania* v. *Nelson* before this Court). The bill was passed over the veto, but by a close vote in the state Senate.[12]

At appellant's trial without a jury in November, 1953, the Chairman and one member of the Commission testified concerning its operation (R. 37-48), and the stenographer employed by the Commission read the record of appellant's appearance before the Commission (R. 49-59). The defense presented no evidence.[13]

On May 3, 1954, the trial court sustained appellant's motion for directed verdict of acquittal as to five counts in the indictment, on the grounds that the questions were not pertinent to the matter under inquiry by the Commission (Counts 2, 29 and 35, R. 2, 5), or were repetitious of other questions (Counts 7 and 36, R. 2, 5). The court found appellant guilty on the remaining 32 counts. Counsel informed the court that appellant had never been convicted of a crime in her life (R. 66). The court fined appellant $100. each on counts 1, 3, 4, 5 and 6, and suspended fines on the other counts.

Twenty-three other witnesses before the Commission were likewise found guilty of contempt of the Commission. Nineteen of these cases are now pending, thirteen before the Supreme Court of Ohio, with briefs to be filed 30 days after this Court renders its decision in the instant case.[14]

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[12] *Ibid.*, at 34-5. It is significant that this bill, when it became part of the new Ohio Revised Code, was entitled: "Offenses—against the State; against the United States."

[13] At the conclusion of the trial, appellant submitted a written Memorandum in support of the motion for directed verdict of acquittal, raising, *inter alia*, the federal constitutional questions (R. 66-79). Following this Court's decision in *Pennsylvania* v. *Nelson*, cited *supra*, appellant submitted its Reply Memorandum, making reference to that decision (R. 82-85).

[14] *State of Ohio* v. *Slagle, Perry, Bohus, Mladjan and Cooper*, on appeal from Stark County Court of Appeals; *State of Ohio* v. *Arnold, Gorday, Murphy, Thomas, Lyons, Carrigan, Glauser* and

The District Court of Appeals affirmed appellant's conviction without opinion (R. 96). The Ohio Supreme Court, after hearing argument, agreed to hear the case, and argument was had the day after this Court handed down its decisions in the *Emspak, Bart* and *Quinn* cases (cited *supra*). Reargument was ordered in the fall of 1955. The decision of the Ohio Supreme Court was handed down February 23, 1956. It was a 4-3 decision, with three dissenting opinions.

The majority agreed that appellant's reference to "the Fifth Amendment" was sufficient to claim any privilege appellant might have under Article I, Section 10 of the Ohio Constitution, and under the United States Constitution, despite her failure to refer to the provision in the Ohio Constitution (R. 112-113).

The majority opinion assumed, without discussing it, that the Fifth Amendment was inapplicable in this state hearing (R. 112), and also apparently assumed that appellant might have needed the protection against self-incrimination because of fear of prosecution under the state criminal syndicalism act, and the Smith Act (R. 117). But the court majority ruled that Sec. 60 Genl. Code clothed appellant with immunity when she appeared as a witness (R. 117), reasoning that the existence of the state immunity act made it unnecessary to notify the witness that her claim of the privilege was rejected and made it unnecessary for the Commission to direct her to answer the questions asked (R. 118-124). The majority held that appellant could not, in this state proceeding, decline to

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Furry, on appeal from Summit County Court of Appeals—pending in Ohio Supreme Court. *State of Ohio* v. *Jackson* and *Terrill*, Franklin County Court of Appeals, ##5243 and 5244—these were originally companion cases to the *Morgan* case. *State of Ohio* v. *Hupman, McGill, Thamel* and *Hupman*, Franklin County Court of Appeals, ##5159-5162.

answer questions which might tend to incriminate her in a federal proceeding (R. 116-117).

Three justices wrote dissenting opinions. Justice Stewart dissented in part, for the following reason:

> "The commission was composed in part of able and experienced lawyers, and it hired special counsel, and yet the defendants were informed by the chairman of the commission that they had a right to rely upon their constitutional privilege against self-incrimination. * * *
>
> "Even if the chairman was mistaken as to the law and the effect of the Ohio Immunity Statute, and Mrs. Morgan was likewise mistaken, how can it be said that she was in contempt of the commission in strictly following its direction and admonition? The point is further emphasized by the fact that in every instance when she refused to answer a question, claiming protection against self-incrimination, she was never directed to answer the question but the interrogator immediately proceeded with another inquiry" (R. 137).

Justice Hart dissented on the following ground:

> "In the instant case, where the claimed subversive acts of the defendants as against the state government may also be the basis of a prosecution by the federal government for subversive acts against it or the states, I am of the opinion that under the protection of the Fifth Amendment these defendants could lawfully refuse to answer incriminating questions before the legislative committees, notwithstanding the purported protection of the state immunity statute" (R. 135-6).

He quoted this Court's opinion in *Counselman* v. *Hitchcock*, 142 U.S. 547, in support of his position:

> "'We are clearly of opinion that *no statute which leaves the party or witness subject to prosecution after*

*he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. * * * In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.' * * * "* (R. 133-4). (Emphasis in the original.)

Justice Taft dissented on a jurisdictional ground:

"My conclusion therefore is that the General Assembly clearly expressed an intention that the Un-American Activities Commission should be regarded as something other than a 'committee of the General Assembly.' It follows that Section 12845, General Code, did not authorize the indictment in the *Morgan case.* * * * Since * * * the General Assembly clearly expressed an intention that the Un-American Activities Commission should be regarded as something other than such a 'committee', the premise relied upon by the majority will not support their decision. There is no statutory grant of immunity with respect to testimony before the Un-American Activities Commission" (R. 141).

On appeal, this Court, on June 24, 1957, in a *per curiam* opinion, vacated the judgment of the Ohio Supreme Court and remanded to the Supreme Court of Ohio "for consideration in the light of *Sweezy* v. *New Hampshire by Wyman, attorney general,* * * * and *Watkins* v. *United States.* * * *" (R. 147). On briefs and oral argument, the Ohio Supreme Court, on February 11, 1958, decided that it did "not find enough similarity with the *Sweezy* and *Watkins* cases to warrant a change in its former judgment." The *per curiam* opinion was concurred in by four Justices. Justice Taft

renewed his dissent (R. 149).[15] Appellant's application for rehearing was denied. On October 20, 1958, this Court noted probable jurisdiction and postponed further consideration of the question of jurisdiction to the hearing on the merits.

Summary of Argument

I.

This case is similar to *Watkins* v. *United States* and *Sweezy* v. *New Hampshire*, as this Court indicated by its vacation of the verdict and remand to the Ohio Supreme Court for reconsideration in the light of the decisions in those cases. The act establishing the Un-American Activities Commission of Ohio is repugnant to the United States Constitution in several respects.

It is legislation in the field of "sedition," a field in which Congressional action has superseded state action, and it touches upon foreign affairs, a field in which federal power is exclusive and supreme.

It provides for investigations into the political beliefs, activities, and associations of persons in private life which can serve no valid legislative purpose, and which necessarily abridge the witnesses' First Amendment rights.

It requires the "disclosure" of persons and groups holding dissident political beliefs, with the threat of prosecution by the state or federal governments under sedition laws, but without a fair procedure for determining who falls into the category of "un-American," and with no valid

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[15] Justice Hart, who dissented from the 1956 decision, was no longer on the bench. Justice Stewart, who dissented, in part, from the 1956 decision, and the new Justice Herbert, did not participate in the 1958 decision.

legislative purpose, and therefore constitutes a denial of due process under the Fourteenth Amendment.

In addition, the language of the statute is too vague to meet due process standards, as was the similar language in *Sweezy* and *Watkins*.

Lastly, the vague grant of authority to the Commission gives no clear indication of the Assembly's interest in the information obtained at the hearings, and constitutes a denial of due process because it permits a complete separation of the Assembly's responsibility in this field from the operation of the Commission.

II.

The Ohio immunity act, as interpreted by the Ohio Supreme Court in this case, is repugnant to the United States Constitution because it requires a witness to answer questions which might incriminate him, without affording him protection sufficient to eliminate the threat of prosecution. When immunity is granted, a witness could not be prosecuted by the state. But he could still be prosecuted by the federal government. The threat of federal prosecution in this field of sedition is real and imminent. This is a field in which state and federal governments have been working together, and concurrent prosecutions by state and federal officials against the same individuals have occurred. This threat is made explicit in the statute establishing the said Commission, which requires that state officials cooperate with federal officials.

In addition, this immunity act, as interpreted and applied by the Ohio Supreme Court, permits convictions for contempt in the absence of directions to answer, and without knowledge on the part of the witness that the immunity act offers any protection against prosecution. This clearly denies due process of law.

The immunity act applies only to "committees" of the Ohio General Assembly. The Un-American Activities Commission in this case is not such a committee, and the act therefore does not apply to it.

III.

Appellant was denied due process of law under the Fourteenth Amendment by her conviction for wilful refusal to answer questions pertinent to the matter under inquiry, because her actions were not wilful refusals to answer, but proper claims of the privilege against self-incrimination as to questions which had a tendency to incriminate her in state and federal jurisdictions. The questioning body acquiesced in her claims of the privilege. This was indicated by the failure to direct the witness to answer the questions, after her original refusal. It was indicated even more sharply by the advice given to her by the chairman of the Commission, an attorney, who advised her that she was permitted, under the Fifth Amendment, to refuse to answer incriminating questions.

The problems of pertinency raised in the *Watkins* and *Sweezy* cases are inherent in any investigations in the field of "un-American activities," and arose in the instant case because the witness was not informed of the purpose for which the hearing was called. Nor was there any guide by which she could determine, for herself, during the hearing, whether the specific questions asked were pertinent to any valid legislative purpose, since the statutory language is as vague as in *Watkins* and *Sweezy*. In addition to the questions which only remotely touched on any topic, past or present, which might be deemed "un-American," several of the counts against appellant related to questions which were purely preliminary. Conviction under these facts constituted a denial of due process.

Basically, appellant was asked only one question, not 32, and that related to her political activities and beliefs and associations, questions outside the jurisdiction of the State of Ohio, and protected by First and Fourteenth Amendments.

ARGUMENT

I.

The Statute Establishing the Commission Is Repugnant to the United States Constitution.

A. *The State has no power to act in national and international affairs, or in the field of subversion, which Congress has fully occupied.*

Appellant was subpoenaed pursuant to a statute establishing the Un-American Activities Commission whose stated purposes included, *inter alia*: investigations of persons and groups "dominated by or giving allegiance to *a foreign power*" or whose activities might adversely affect Ohio's contribution to *"the national defense,* * * * the functioning of any agency of the * * * *national government* or the industrial potential of this state"; to assist in the revision of *federal* sedition statutes; to "maintain liaison with any agency of the *federal* * * * *government*[s] *in devising and promoting means of disclosing* those persons and groups who seek to alter or destroy *the government* of this state or *of the United States* by force, violence, intimidation, sabotage or threats of the same." (Emphasis supplied.) Sec. 76-31 (1)(a), (b), (c) Genl. Code.

Under this statute appellant was asked more than forty questions. The questions were not limited to matters of concern to the State of Ohio. Several questions related to appellant's alleged signing of a petition to the United

Nations (Counts 31-35, R. 5). The last question referred to appellant's activities in Illinois before moving to Ohio (Count 37, R. 5). The questions concerning the Communist Party referred to it as a national organization (particularly Counts 11, 18 and 27, R. 3, 4, 5). No questions were asked about the purposes or activities of the *Ohio* Communist Party *in Ohio*, as distinct from its role as part of the national Communist Party.[16]

This Court has recognized that, in the twentieth century, seditious activity is a national problem, and is not directed against any single state. *Pennsylvania* v. *Nelson*, cited *supra*. This statute makes this fact explicit. The two annual Reports of the said Commission, of which this Court is asked to take judicial notice, likewise consider "un-American activities" on a national scale, with no references to activity on a purely state level.[17]

The Constitution of the United States provides that the federal government shall have exclusive jurisdiction over the conduct of foreign affairs (Art. I, Secs. 8, 10; Art. II, Sec. 2) and over the protection of the federal government from invasions and insurrections (Art. I, Sec. 8). The statute which established the Ohio Commission gave it the power and duty to investigate activities in these areas. Such provisions clearly contravene the federal Constitution.

This Court has held, in addition, "that Congress has intended to occupy the field of sedition. Taken as a whole, [the acts of Congress] * * * evince a Congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore a state sedi-

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[16] Although appellant raised the supremacy and supercession questions in its Reply Memorandum (R. 82-85), they were not discussed by the Ohio Supreme Court in its opinion.

[17] See 1953 Report, at 11-33; 1954 Report, at 9-30.

tion statute is superseded regardless of whether it purports to supplement the federal law." *Pennsylvania* v. *Nelson*, 350 U.S. 497, at 504.

The legislature of Ohio therefore could not pass a valid state sedition statute.

The act establishing the Un-American Activities Commission was invalid for two reasons:

First, it operated as a state sedition statute. The method of enforcing this statute was, through subpoenaing witnesses to appear at public hearings, asking questions concerning their own and other people's political activities and actions which might be "subversive" in the eyes of the Commission, disclosing the names of the witnesses to the public, and to other state and federal agencies. (See discussion on "disclosing" *infra*, at point I.c.)

Second, the act required the Commission to seek information which would be helpful in drafting additional statutes in the field of sedition for presentation to the Ohio General Assembly for passage. But, as this Court has explained, " • • • these [investigating committees] are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere." *Watkins* v. *United States*, 354 U.S., at 205-6. Since sedition does not fall within the state legislative sphere, this statutory grant of authority to the Commission was also invalid.

When William B. Saxbe, co-author of legislation establishing the predecessor of the Commission, became Attorney General of Ohio in 1957, he recognized that this Court's decision in the *Nelson* case "said that Pennsylvania did not have the authority to enter the field of investigation of Un-American Activities, even though the statute had not said so, Congress had pre-empted the field. That ended the

program in Pennsylvania, Ohio and a great many other states." [18]

Since the Assembly could not pass any valid statutes in this field already occupied by Congress, and limited to the federal government by the federal Constitution, the hearings had no valid legislative purpose and the statute authorizing such hearings was repugnant to the federal Constitution.

B. *The Commission is given statutory authority to investigate the political beliefs, associations and activities of private citizens, thus abridging their constitutionally protected freedoms.*

For lawyers accustomed to qualifying clauses, it is refreshing occasionally to read the First Amendment in the naked form in which it was written: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Since this Court's wise and necessary decision that the First Amendment guarantee of rights is implicit in the Fourteenth Amendment as against state action, *Palko* v. *Connecticut*, 302 U.S. 319, at 325, citizens of state and nation have been encouraged to practice these freedoms. The Ohio Constitution also contains strong provisions concerning freedom of speech, press and assembly. (See Ohio Constitution, Article I, Sections 1, 2, 3 and 11.)

When these freedoms are consistently circumscribed by investigations and threats of jail for contempt, the need

[18] William B. Saxbe, Address to the Columbus and Akron Bar Associations, 47 The Ohio Bar 1041, 1043, December 9, 1957.

for the freedoms does not diminish and the fight to restore and maintain the First Amendment does not cease. But few dare exercise their rights, particularly the right to think thoughts which may prove dangerous to the existing order of things—whether in science or psychology or political theory. Yet the future of our society depends upon these new thoughts. Endless newspaper headlines in 1952 in Columbus, Ohio—a college town—concerning the arrest and trial and conviction of an ordinary housewife for contempt of the Legislature for refusing to answer questions about her political beliefs and affiliations have an effect, not only upon appellant, but upon the political and intellectual climate of the capital of Ohio.

It is to be regretted that the Supreme Court of Ohio, unlike the Supreme Court of New Hampshire in *Sweezy*, did not consider the First Amendment problems raised by appellant in the instant case (R. 80-82). But there can be no doubt that here, as in *Sweezy*, the rights of all witnesses called before this Commission—to think, to speak or be silent, their right to associate with others—were abridged through this investigation. "Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Sweezy* v. *New Hampshire*, 354 U.S., at 250.

This Court has more recently described the effect of a state order requiring the disclosure of the names of members of an organization:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy

> may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. * * * " *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, at 460-62.

This Court is aware of the effect upon a person's ability to earn a living, his family, his status in the community merely from the receipt of a subpoena to appear before a committee investigating "un-American activities." *Watkins* v. *United States,* 354 U.S., at 197. In *Speiser* v. *Randall,* this Court found that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. 513, at 519.

A statute which has as its purpose the summoning of witnesses to appear, against their will, to be questioned about their political beliefs, associations and affiliations by an agency of the state with power to jail them for contempt is clearly repugnant to the First and Fourteenth Amendments.

In addition, this statute on its face would cause law-abiding citizens of Ohio to question their right to believe in various types of governmental reform, and their right to advocate such reforms. The section requiring the Commission to investigate all persons and organizations "whose activities might adversely affect * * * the industrial potential of the state" certainly contains a threat to the free

exercise of constitutionally-protected rights by trade unions in every industry in the State of Ohio.[19]

This Court held, in *Watkins*:

> "* * * Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless, an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making." 354 U.S., at 197.

But here there is a statute to be reviewed. The statute establishing the Commission is itself repugnant to the First and Fourteenth Amendments.

The investigations conducted under the statute constituted additional infringements of these rights. Of the 47 questions asked of appellant, none related in any way to appellant's ideas or objectives as an individual, or to the philosophy or objectives of the Communist Party (aside from the customary organizational need to raise funds). None of the questions mentioned anything remotely related to "the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means." None of the questions mentioned or assumed that appellant or the Communist Party were dominated by or gave allegiance to a foreign power. None of the questions even remotely touched on any activities which might adversely affect the contribution of Ohio to the national defense or the security of Ohio or the functioning of any agency of

[19] See count 29 herein, referring to appellant's picketing during a strike.

the state or national government, or the industrial potential of the state. Nor did any of the questions relate to the operation and effect of the laws of Ohio or any other state, or the United States, which purport to outlaw and control the activities mentioned above, in the language of the statute.

On the other hand, every question was designed to "disclose" to the public the past and present political affiliations of appellant, and the names of additional persons with those affiliations.

Even if appellant had been willing to abandon her right to privacy of political opinion, she could not have conducted a "First Amendment discussion" of her political theories and objectives with the members of the Commission. A Commission hearing, with counsel asking Yes and No questions, is no free market place of ideas where a reasoned give and take can occur, out of which new approaches may emerge. The purpose of the hearing was compulsory disclosure of political beliefs, and this has always been the enemy of freedom of thought.

One other First Amendment problem must be mentioned. The concept of "balancing contending principles" where First Amendment questions arise cannot be found in the wording of the Amendment or in the correspondence of its framers. But Ohio, like New Hampshire, apparently felt the need to be informed on the "elemental subject of self-preservation." This Court, balancing this State need against the rights of a witness, stated in 1957 that it did "not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields," i.e., the fields of freedom of association and thought, including unorthodox and dissenting thought. *Sweezy v. New Hampshire,* 354 U.S., at 251. Appellant believes that the same circumstances existed in 1952 at the time of this

hearing in Ohio and that the State has made no showing to the contrary.

The threat to the security of Ohio shown by the questions asked of this appellant is as remote, shadowy and meager as that shown in *Sweezy*. No such threat can be demonstrated by questions about appellant's signing a petition to the United Nations (Counts 31-34), or questions about the activities of the Communist Party of Franklin County, many of which indicate the weakness of the said Party (see Counts 13, 14, 18, 22, 27), and all of which sought merely to corroborate information already in the possession of the questioning body. Nor did the State show how its concern for self-preservation was advanced by abridging the political privacy of appellant by subpoenaing her and compelling her either to answer the questions asked or face a contempt citation.

For all of these First Amendment reasons, the statute establishing the Commission is repugnant to the United States Constitution.

C. *The statutory requirement that the Commission "disclose" all persons and groups having certain objectives serves no valid legislative purpose and pins a "badge of disloyalty" on individuals without due process of law.*

The statute establishing the Commission requires it to maintain a liaison with agencies of the federal, state, and local governments "in devising and promoting means of *disclosing* those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage or threats of the same. • • •" Sec. 76-31(2), Genl. Code.

Nine months after conducting the hearing in which appellant appeared as a witness, the Commission filed its

first report with the General Assembly, in which it recommended that further investigation of "subversive activities" be conducted by an assistant attorney general "with hearings before the county grand juries instead of before a commission. Undoubtedly, this will do much to satisfy those persons opposed to public hearings, because the traditional secrecy which normally surrounds grand jury proceedings will cloak these hearings as well, and only such matters as the grand juries choose to report upon will become public records. Primarily, such hearings will look toward indictments for violations of the criminal sections of this act." [20] "Unique in the field of legislative committees, this Commission set its own death date and recommended its functions be absorbed by the Attorney General of Ohio." [21]

It is commendable that the Commission itself became sensitive to the violations of due process inherent in its procedures. Nor could the "disclosure" of persons serve a valid legislative purpose. In performing its function of initiating bills, and amending and repealing statutes, a legislature may need the information gained through legislative committee hearings. But a legislature does not need and cannot use information about the beliefs and activities of specific individuals while the constitutional prohibition against bills of attainder stands.

Clearly a legislative body has no power to disclose the names of persons as being "subversive" or "disloyal." As this Court stated recently: "We have no doubt that there is no congressional power to expose for the sake of exposure." There is "no general power to expose where the predominant result can only be an invasion of the private

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[20] 1954 Report, at 25.

[21] *Ibid.*, at 9.

rights of individuals." *Watkins* v. *United States*, 354 U.S., at 200.

Under the Constitution and the Anglo-American concept of due process of law, an individual cannot be found guilty of crime unless certain procedures are followed. No agency of government can "disclose" that an individual has committed a crime until there has been an indictment or information, arraignment, trial and verdict (with opportunity for appeal). And each of these steps in the criminal procedure must be taken according to certain rules which protect the individual from the likelihood of conviction if, in fact, he is innocent.

It is obvious that a hearing before a legislative fact finding committee does not provide the procedural safeguards surrounding a defendant in a criminal case. There is no clear and concise statement of the charges against the witness in advance of the hearing; there are no rules of evidence in the hearing, such as the right to effective advice of counsel of the type required in criminal cases, the right to confrontation and cross-examination of opposing witnesses. Nor is there a right to be heard by a jury of one's peers, or for a determination by a person sitting as an objective, disinterested judge. There is no effective appeal from the "verdict" of the legislative Commission. There is, instead, "conviction" by questioning, and immediate disclosure of "guilt."

This Court has held that all hearings in the field of "un-American activities" restrain speech. The comments in *Speiser* v. *Randall* are therefore applicable here:

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of

a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. * * * When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. * * * " 357 U.S., at 520.

The Ohio statute provides no procedural safeguards for the witness appearing before the Commission. The majority opinion of the Ohio Supreme Court did not touch on appellant's contention (R. 102) that the Commission acted without authority as a grand jury or police force, seeking to discover crime and criminals, without rules to insure due process of law, and with only the vaguest and broadest conception of its quarry, as indicated by the testimony of a Commission member:

Mr. Devine: "Well, Judge, the Commission was organized for * * * three purposes, * * * One, to investigate in the State of Ohio to determine whether or not there was Communism; second, if we did find that it did,

exist, whether or not it constituted a danger; and third, if we did find that it existed and constituted a danger, to make recommendations to the next General Assembly legislation to cope with any situation that we found. * * * " (R. 48).

The statute was invalid for the additional reason that it did not require "the necessary element of guilty knowledge" by the witness before he was subpoenaed and questioned and "disclosed" as "un-American." *Wieman* v. *Updegraf*, 344 U.S. 183.

It is of interest that the Attorney General of Ohio read with care, and with approval, this Court's decisions at the end of the 1956 October Term, and concluded:

" * * * Notice that the error which has been the grounds for reversal in nearly all of [the cases discussed, including *Watkins, Sweezy, Yates, Jencks, et al.*] has been procedural error—either in the apprehension or trial of the offenders. The court is saying now that the threat of Communism has abated and that the doctrine of clear and present danger will not be heard in court. If you are going to catch a Communist, you must do it by the rules. Whether by means of a Congressional investigation, Attorney General's action, or however, it's no longer on a catch as catch can basis—but must be done strictly according to law and procedure. * * *

"There is little logic in depriving liberty out of alleged necessity to prevent a similar deprivation later on. I think the interest of the court is to follow what the people want and expect today, namely, protection and preservation of civil liberties. * * * " William B. Saxbe, then Attorney General of Ohio, 47 Ohio Bar, at 1046-7.

The language of the statute establishing the Un-American Activities Commission of Ohio makes necessary a finding that it is repugnant to the federal Constitution.

D. *The statute is invalid because of its vague language.*

The authority given to the Ohio Commission was "broadly drafted and loosely worded," it provided a "sweeping mandate" to the Commission without properly stating the limits on the scope of the Commission's inquiry. The vice of vagueness found in the mandates of the House Un-American Activities Committee, in *Watkins*, and of the Attorney General of New Hampshire, in *Sweezy*, are equally present here.

The Ohio Commission was directed to investigate "*all* facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective *or may be suspected of having* as their objective the overthrow *or reform* of our constitutional governments by fraud, force, violence, *or other unlawful means;* all facts concerning persons, groups and organizations, known to be *or suspected of being dominated by* or *giving allegiance to* a foreign power or whose activities might *adversely affect* the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government or *the industrial potential of this state;* * * * " Sec. 76-31 Genl. Code.

Counsel could not define the italicized words and phrases, nor could appellant. Neither the legislature of Ohio nor the Ohio Commission nor the Ohio Supreme Court has defined these words and phrases with the degree of explicitness needed to meet due process requirements in a statute providing a criminal penalty for failure to answer questions.

Further, the statute contains no differentiation between "knowing" and "innocent" association or activity. *Wieman* v. *Updegraf, supra.*

E. *The vague statutory grant of authority to the Commission made it impossible for a reviewing court to judge whether the Commission had ranged outside the area committed to it by its parent Assembly, and insulated the Assembly from the witnesses subjected to the sanction of compulsory process.*

This Court, in its decisions in *Sweezy* and *Watkins*, considered at some length the proper wording of a grant of authority to a state or federal legislative investigating body, and the proper scope of its inquiry. The Court also considered the separation of the authority of the legislature to obtain information from the actual workings of the creature established by the legislature for this purpose. *Sweezy* v. *New Hampshire*, 354 U.S., at 245-7; *Watkins* v. *United States*, 354 U.S., at 201, 205-6.

The grant of authority to the Ohio Commission contained all of the evils mentioned in these two opinions, as a reading of Sec. 76-31 Genl. Code indicates.

In addition, the Ohio Commission did not commence its work until after the *sine die* adjournment of the General Assembly. And a witness who declined to answer questions before the Commission could be indicted for contempt without any action by the Assembly, or by a reviewing magistrate. In Congress, a contempt citation must be voted by the investigating committee, and approved by the entire House before an indictment can be drawn. (See *Watkins* v. *United States*, cited *supra.*) In New Hampshire, the witness who refused to answer questions asked by the attorney general acting as a legislative investigating committee was called before a judge, who decided whether such

questions must be answered. The "committee" did not make the final determination that a contempt citation should be drawn. (See *Sweezy* v. *New Hampshire,* cited *supra.*)

Appellant contended before the Ohio Supreme Court, on remand from this Court, that the legislature of Ohio, like the legislature of New Hampshire in the *Sweezy* case, had not made known the nature of the data it desired, but instead had insulated itself from those witnesses whose rights might be vitally affected by the investigation. The legislature in effect told the Ohio Commission to screen the citizenry of Ohio to bring to light anyone who fitted into the expansive statutory definitions. *Sweezy* v. *New Hampshire, supra,* at 253; *Watkins* v. *United States, supra,* at 204-5.

Appellant also contended that the Ohio General Assembly had delegated to the Commission the task of separating the classes of information deemed desirable, in the light of the legislature's object, from the information it could not validly acquire without infringement of the constitutional rights of the witnesses. The Ohio Supreme Court did not rule on this contention, or on appellant's claim that the state courts as a result could not know with any assurance that the questions appellant refused to answer fell into a category upon which the legislature wanted to be informed. *Sweezy* v. *New Hampshire, supra,* at 254.

But some guidance can be given to this reviewing Court, which was not available in the *Watkins* or *Sweezy* cases, because the Assembly did not repeatedly renew the life of the Commission it had established in 1951. On the contrary, the Assembly accepted the recommendation of the Commission that: 1) no further legislative investigations be conducted in the field of "un-American activities"; 2) no further hearings be conducted in order to "disclose" persons; 3) all further investigations in this field be held before the county grand juries where the witnesses would be

cloaked with the "traditional secrecy," and 4) such hearings will "primarily" "look toward indictments for violations of the criminal" state sedition law.[22]

Not only the members of the Commission and the Assembly expressed the need for a different approach in this field, but later the Attorney General of Ohio showed the necessary concern for procedural due process in the investigation of "un-Americans," cited *supra*, at point I.c. And, as noted above, after the *Nelson* decision, even the new statutes giving power to the assistant attorney general to investigate in this area fell into disuse.

For all of these reasons, the statute establishing the Commission is repugnant to the federal Constitution.

II.

The Immunity Act, as Interpreted by the Supreme Court of Ohio, Is Repugnant to the United States Constitution.

A. *The act displaces the right of a witness to refuse to answer on the ground of self-incrimination when the answers could become the basis for prosecution in the federal jurisdiction, which is coterminous with state jurisdiction.*

This case involves a witness before a state Commission investigating in the field of "un-American activities" who, appearing without counsel, claimed the privilege against self-incrimination contained in the Fifth Amendment to the federal Constitution in declining to answer certain questions, for fear of prosecution under the state syndicalist act[23] and the federal Smith and McCarran Acts,[24] no men-

[22] *Ibid.*, at 25.

[23] Sec. 13421-23 to -26, Ohio Gen. Code, now Sec. 2923.12-.14, Ohio Rev. Code.

[24] 18 U.S.C. 2385; 50 U.S.C. 783.

tion of a state immunity statute having been made. The Commission was given the "power and duty * * * (2) To maintain a liaison with any agency of the federal * * * government[s] in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage or threats of the same." Sec. 76-31 Genl. Code.

The majority of the Ohio Supreme Court held that appellant's mention of the "Fifth Amendment" was sufficient to invoke her privilege against self-incrimination under the Ohio Constitution, Article I, Section 10, but that she had no privilege under the Fifth Amendment, since that Amendment applies solely to activities of the federal government (R. 117-126). Justice Hart wrote a strong dissent (R. 131-6). The Court did not consider the statutory requirement of state cooperation with federal agencies in this field, which was urged by appellant as a significant factor in this case (R. 102, point (d)).

The Ohio immunity act, Sec. 60 Genl. Code, is a broad statute, within the meaning of the decision in *Counselman* v. *Hitchcock*, 142 U.S. 547. It provides that the "testimony * * * shall not be used as evidence in a criminal proceeding against him, nor shall a person be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter or thing, concerning which he so testifies, * * *". The language is almost identical with the language in the federal Immunity Act of 1954 passed upon by this Court in *Ullmann* v. *United States*, 350 U.S. 422, and in the New York immunity act passed upon by this Court in *Knapp* v. *Schweitzer*, 357 U.S. 371, except that the latter use the word "any" each time the Ohio act uses the word "a."

This Court has interpreted this section of the federal act as providing immunity from all prosecutions, federal or state. *Ullmann* v. *United States*, cited *supra*, at 436.

It may be helpful at this juncture to distinguish between the facts in the recently-decided *Knapp* case and the facts now before the Court. Knapp was subpoenaed to appear before a New York State grand jury investigating the "conventional state crimes" of corruption and misconduct under state law. He was specifically granted immunity from state prosecution when he refused to answer on the ground of self-incrimination. On application of the grand jury foreman, the court directed Knapp to answer the questions. After further refusal, the court adjudged petitioner in contempt, rejecting his claim of fear of federal prosecution based on a statement of the United States Attorney that he would "cooperate" with the state's attorney in this field.

Appellant was subpoenaed to appear before an Ohio Commission investigating in the area of "subversion," an area fully occupied by Congress in which the state has no power to act. This is also an area involving rights guaranteed by the First and Fourteenth Amendments, the "essential rights" referred to by James Madison (as quoted in *Knapp*, 357 U.S., at 377), the "rights of conscience." It is not an area of "traditional power to investigate in aid of prosecuting conventional state crimes, some facts of which may be entangled in a federal offense," *Knapp* v. *Schweitzer*, at 374-5, but quite the reverse. The appellant was not granted immunity from state prosecution; the immunity act was never mentioned during the hearing. The appellant was not directed to answer any question she refused to answer. The Chairman of the Commission acquiesced in her claim of privilege against self-incrimination under the Fifth Amendment (R. 52). The act under which the Commission operated *required* close cooperation with federal agencies, and, in fact, concurrent state and federal prosecutions against "subversives" were then in progress in a neighboring state. *Pennsylvania* v. *Nelson*,

350 U.S. 497; *Mesarosh* v. *United States*, 352 U.S. 1. A federal Smith Act prosecution was instituted in Cleveland, Ohio shortly after this hearing. (See note 3, *supra*.)

This recitation of the differences in the facts in *Knapp* and *Morgan* indicates that the decision in *Knapp* cannot fit the instant case.

Chief Justice Warren, in his concurring opinion in *Regan* v. *People of New York*, 349 U.S. 58, pointed out that:

> "This Court has never held that a State, in the absence of an adequate immunity statute, can punish a witness for contempt for refusing to answer self-incriminatory questions. A case involving such facts has never been presented here.[1]"

This case presents this issue. Assuming appellant was granted complete immunity from state prosecution, she was left subject to prosecution by the federal government.

Justice Hart of the Ohio Supreme Court dissented from the judgment of the court for this reason, citing this Court's opinion in *Counselman* v. *Hitchcock* that:

> "* * * no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. * * * In view of the constitutional pro-

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NOTE 1. "Compare *Twining* v. *State of New Jersey*, 211 U.S. 78 (jury instruction authorizing the jury in a criminal case to draw an unfavorable inference from the accused's failure to take the stand); *Adamson* v. *People of State of California*, 322 U.S. 46 (state law permitting prosecutor and trial judge to comment on the accused's failure to take the stand); *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105 (denial of permission to the accused to accompany jury on visit to scene of crime); *Palko* v. *Connecticut*, 302 U.S. 319 (state statute allowing appeal by State in criminal case)" (at 65).

vision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." 142 U.S. 547, at R. 133.

And this Court recently said that it is "not unmindful of the risk of compounding punishments which would be created by finding concurrent state power" over seditious activity. "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment." *Pennsylvania* v. *Nelson*, cited *supra*, at 509-510.

While cases can be cited for the proposition that one jurisdiction need not protect against the threat of prosecution in another jurisdiction when it compels a witness to testify in a proceeding, it is significant that the facts in each case clearly indicate that there was, in fact, no substantial threat of prosecution in any other jurisdiction:

Jack v. *Kansas*, 199 U.S. 372;
Brown v. *Walker*, 161 U.S. 591, 606-608;
United States v. *Murdock*, 284 U.S. 141;
Hale v. *Henkel*, 201 U.S. 43;
Knapp v. *Schweitzer*, cited *supra*.

And where such a threat did exist, "one way or another" the witness was protected from incriminating himself in the second jurisdiction:

Ballman v. *Fagin*, 200 U.S. 186;
United States v. *Saline Bank*, 1 Peters 100;
In re Kantor, et al., 117 F. 356;
Marcello v. *United States*, 196 F.2d 437.

Even Wigmore, who strongly urged the view that the privilege against self-incrimination should be narrowly con-

strued, and who favored the two-sovereignties rule, distinguished three types of cases and said of the first category:

> "(1) The act may be criminal in another court or system of law in the same jurisdiction of legislative sovereignty; here the privilege applies." He cited, in a note: "1749 *E. India Co.* v. *Campbell*, 1 Ves. Sr. 246 (discovery of facts rendering a defendant punishable in the British criminal jurisdiction in Calcutta, though not in England, held not compellable); 1750 *Brownsword* v. *Edwards*, 2 Ves. Sr. 243 (discovery of an incestuous marriage, refused, incest being punishable in the ecclesiastical Court; 'the general rule is that no one is bound to answer so as to subject himself to punishment, whether (or not) that punishment arises by the ecclesiastical law of the land')." Wigmore, Evidence, Vol. 8, page 340, Sec. 2258.

And see J. A. C. Grant, Federalism and Self-Incrimination, Parts I and II, IV U.C.L.A. Law Review No. 4 (June 1957), V U.C.L.A. Law Review No. 1 (January 1958); The Use of State-Compelled, Self-Incriminating Testimony in Federal Court, 68 Yale Law Journal 322-334 (1958).

Counsel know of no case in which a witness in one jurisdiction who actually faced a substantial threat of prosecution in a second jurisdiction was required to answer questions following a claim of the privilege against self-incrimination, or convicted of contempt for refusal to so answer. In view of the lack of any state jurisdiction over the crime of sedition, it can be argued in this instance that state officers were in fact acting for the federal government, thus bringing into play in this state proceeding appellant's privilege against self-incrimination under the Fifth Amendment.

> "* * * the Federal Government may not take advantage of this recognition of the States' autonomy in order to

evade the Bill of Rights. * * * If a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play. * * * " *Knapp* v. *Schweitzer*, cited *supra*, 357 U.S., at 380.

Since this Court has held many times that a State may not convict a person on testimony it coerced from him (*Leyra* v. *Denno*, 347 U.S. 556; *Ashcraft* v. *Tennessee*, 322 U.S. 143), neither may a State force a person to convict himself, or incriminate himself, in a federal proceeding on the basis of testimony coerced from him. Appellant's privilege against self-incrimination as to federal prosecutions justified her claim of the Fifth Amendment privilege, which relates to just such federal prosecutions, even though this claim happened to be made in a state proceeding. Appellant's conviction for contempt by a state court under these facts was barred by the supremacy clause of the United States Constitution, and also by the privileges and immunities clause of the Fourteenth Amendment.

In Justice Holmes' words, "one way or another", the Ohio immunity act, as interpreted by the Ohio Supreme Court in the instant case, must be held repugnant to the federal Constitution because the privilege against self-incrimination ceases only when "immunity displaces the danger", *Ullmann* v. *United States*, cited *supra*, at 507, and the Ohio immunity act cannot displace the imminent danger of federal prosecution in this case.

Although this state immunity act has long been on the statute books, this is the first case in which the provisions were construed by the Ohio Supreme Court (R. 114). And this Court has never passed on the validity of a contempt conviction of one appearing as a witness before a legislative committee which claimed the power to grant immunity. In addition, the "double sovereignties" problem, as it re-

lates to legislative committees, has not been ruled on by this Court.

The reason that legislative immunity statutes have not been tested previously apparently is that legislative committees seldom grant immunity. There is no indication, in the instant case, that the Ohio Commission would have granted appellant immunity if the members of the Commission had known of the existence of the Ohio immunity act (R. 137). It is clear that the members of the Commission either did not know of the existence of the immunity act, or assumed that it would not operate to supplant the right of a witness to refuse to answer questions which might incriminate her in the *federal* jurisdiction (R. 52).

The cases cited above involve grand jury investigations into crime and hearings before administrative agencies. There is a fundamental distinction between such proceedings and hearings before a legislative investigating committee, involved in the instant case. A grand jury exists to discover the commission of crimes. It functions as part of the judicial system and is an agency in the administration of justice. A legislative investigating committee has no authority to act as a grand jury, or to discover the commission of crimes. Its only authority is to investigate for the purpose of proposing legislation.

The theory behind all immunity acts is that the questioning body has the authority to compel testimony even if it may incriminate the witness, and has the authority to grant a pardon in advance, or otherwise protect the witness from subsequent prosecution as to matters touched in his compelled testimony. Does a non-law enforcement agency have the authority to grant a pardon in advance, or otherwise protect the witness from subsequent prosecutions as to matters testified to under compulsion? *Brown* v. *Walker*, 161 U.S. 591, Field, J., dissenting, at 638. And, unless some

procedure were established to insure that a record was made of the testimony of every witness before a state legislative committee, and of every grant of immunity to a witness, denials of due process would necessarily occur.

B. *The immunity act, as interpreted and applied, permits a witness to be convicted of contempt for refusal to answer questions which he was not directed to answer, and without instructing him that he is clothed with immunity from state prosecution.*

Counsel for appellant know of no previous case before a state or federal legislative investigating body in which a conviction for contempt was sustained in the absence of a direction from a member of the investigating body to the witness to answer the question following the witness' refusal to answer.

In the *Emspak*, *Bart* and *Quinn* cases, this Court explained at some length the nature of a direction to answer, that such a direction is "supported by long-standing tradition", "has been uniformly recognized in the procedure of both state and federal courts", and is one of the "minimal procedural standards" without which "there is lacking the element of deliberateness necessary for a conviction under Sec. 192 for a refusal to answer."

> *Quinn* v. *United States*, 349 U.S. 155, at 167-8;
> *Emspak* v. *United States*, 349 U.S. 190, at 202;
> *Bart* v. *United States*, 349 U.S. 219, at 223.

This Court cited several early cases of contempt of state legislative bodies in which the witness, after refusal to answer before a subcommittee or committee of the legislature, was informed in writing that the legislature had voted to direct him to answer the question, and was then summoned before the legislature, where the question was repeated and he was given an opportunity to answer.

Ex parte McCarthy, 29 Cal. 395, at 398;
People v. *Keeler*, 99 N.Y. 463, at 471;
Lowe v. *Summers*, 69 Mo. App. 637, at 645.

The Ohio Supreme Court in its first opinion rejected appellant's contention that her conviction constituted a denial of due process under the Fourteenth Amendment on two grounds: 1) that the appellant would not have changed her answers to the questions if she had been directed to answer; 2) that the Court was not bound by this Court's decisions in *Emspak*, *Bart* and *Quinn* because the state immunity statute "precluded appellant's right to claim the privilege", a "direction to answer thereafter could serve no substantial purpose" and was therefore "unnecessary" (R. 124).

As to the first contention: the facts in the *Emspak*, *Bart* and *Quinn* cases indicated, at least as much as they do in the instant case, that the witnesses had decided before the hearings to refuse to answer certain types of questions which they might be asked. Each of the defendants made a statement of his reasons for refusing to answer the first time he claimed the privilege, indicating his determination not to answer that or other similar questions. *Quinn* v. *United States*, at 167; *Emspak* v. *United States*, at 215-6; *Bart* v. *United States*, at 225.

Yet this Court held that these defendants were entitled to know their status with the committee at each given moment and to know whether the committee rejected or accepted their refusal as to each question. No reason appears for following a different rule in the instant case. The facts here show that the situation was much more confusing to the appellant than to Emspak, Bart or Quinn, because this appellant appeared without counsel. She was not only *not* directed to answer the questions following her claim of the privilege; in fact, she was told by the chairman of the

Commission that she *could* claim the privilege and need not answer any question which might tend to incriminate her.

In the first review of this case before the Ohio Supreme Court, one Justice dissented on this ground:

> "The commission was composed in part of able and experienced lawyers, and it hired special counsel, and yet the defendants were informed by the chairman of the commission that they had a right to rely upon their constitutional privilege against self-incrimination. * * *
>
> "Even if the chairman [of the Commission] was mistaken as to the law and the effect of the Ohio immunity statute, and Mrs. Morgan was likewise mistaken, how can it be said that she was in contempt of the commission in strictly following its direction and admonition? * * * *" (R. 137).

As to the second contention of the Ohio Supreme Court, that the existence of the immunity statute made directions to answer unnecessary, it is significant that this Court, in a case based on a similar state immunity act, pointed out that the contempt occurred when the witness persisted in his refusal to answer in the face of the state immunity act *"after being directed to testify"*. *Regan* v. *People of New York*, 349 U.S. 58, at 64, emphasis supplied.

And see the similar fact situation in *Knapp* v. *Schweitzer*, 357 U.S., at 373.

The dissenting Justice in Ohio felt that the unfairness of the contempt citation against this appellant under these facts was

> "further emphasized by the fact that in every instance when she refused to answer a question, claiming protection against self-incrimination, she was never directed

to answer the question, but the interrogator immediately proceeded with another inquiry" (R. 137).

In the *Watkins* and *Sweezy* decisions, this Court reiterated its concern that a witness before a legislative investigating committee be informed, from moment to moment, of his position in relation to the committee. The requirement that a witness be given a clear direction to answer any question which may become the subject of a contempt citation runs parallel to the requirement that a witness "have knowledge of the subject to which the interrogation is deemed pertinent." *Watkins* v. *United States*, cited *supra*, at 208-9; Frankfurter, J., at 217.

The Ohio immunity statute, as interpreted and applied by the Ohio Supreme Court to permit a witness to be punished for contempt for refusal to answer questions when the witness was not informed of the existence of an applicable immunity act, or directed to answer the questions, is repugnant to the due process clause of the Fourteenth Amendment.

C. *The Ohio immunity act is applied to the Un-American Activities Commission, although, by its terms, it can only be applied to a "committee of the General Assembly", which the Commission was not.*

Appellant was indicted and convicted under a statute punishing contempt of a "standing or select committee of the General Assembly", and the immunity act also refers to such a "committee". At each stage of these proceedings appellant has contended that the Ohio immunity act did not apply to proceedings before the Ohio Un-American Activities Commission because the said Commission did not fall within the definition of a "committee of the General Assembly".

This contention was rejected by a majority of the Ohio Supreme Court in its first opinion (R. 109-112). Justice Taft dissented on this ground at that time (R. 139-141), and reiterated his dissent when the case was again before the Ohio Supreme Court on remand from this Court (R. 149). He agreed with appellant's contention that the Ohio General Assembly consciously used the word "Commission" to designate the investigating body, instead of the word "committee", because "this 'commission' was to act after the *sine die* adjournment of the General Assembly, and the General Assembly was probably fearful that a 'committee' of the General Assembly would cease to have any existence on and after such adjournment, as apparently held by the decision of this court in *Gayman* v. *State, ex rel. Rulison, Pros. Atty.*, 79 O.S. 444, 87 N.E. 1136 (affirming 11 C.C. (N.S.) 257, 21 C.D. 59)" (R. 140).

As a result, the General Assembly made specific provisions in the act establishing the "Commission" for administering oaths, issuing subpoenas, compensating witnesses and punishing witnesses for disobeying a subpoena or refusing to testify. All of these provisions would have been unnecessary if this "Commission" had in fact been a "select committee", since existing statutes provided for these matters as to "committees of the General Assembly". Secs. 57 to 62, Gen. Code.

For these reasons, the Ohio immunity act, as interpreted by the Supreme Court of Ohio, is repugnant to the United States Constitution.

III.

Appellant Was Denied Due Process of Law by Conviction for Wilful Refusal to Answer Questions Pertinent to the Matter Under Inquiry.

A. *The evidence does not support a finding that appellant wilfully refused to answer the questions.*

Appellant was asked over forty questions by the counsel to the Commission. As to each question, appellant answered: "I regret that I cannot answer your question under the Fifth Amendment of the Constitution, because to do so would give your Committee an opportunity to incriminate me" (R. 49), or words to that effect.

Appellant thus claimed the privilege against self-incrimination as explicitly as she knew how. The record shows that the witness, John DeLong, who appeared before the Commission the day before appellant's appearance, had named appellant as an active communist and had stated that Communist Party meetings were held in her home (R. 60-62). The state criminal syndicalism law, Sec. 2923.12-2923.14, Rev. Code, and the federal Smith Act, 18 U.S.C. 2385, and Internal Security Act, 50 U.S.C. 783, make it a criminal offense to commit acts of a subversive nature, and Communist Party members have been prosecuted under these acts: *State of Ohio* v. *Kassay,* 126 O.S. 177, 184 N.E. 521; *Dennis, et al.* v. *United States,* 341 U.S. 494. In this case, Sidney Isaacs, counsel to the Commission, had himself stated the ground for the claim of the privilege as to counts 31 through 35 by his question in count 35: "Are you aware of the fact that the Civil Rights Congress has been cited as both a subversive and communist organization by the Attorney General of the United States?" (R. 5).

It is well-settled law that, under these circumstances, appellant "reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist Party or intimate knowledge of its workings * * * under such circumstances, the Constitution gives a witness the privilege of remaining silent." *Blau* v. *United States*, 340 U.S. 159, at 161.

After appellant gave her answer to the first question, she was asked how revealing her address would tend to incriminate her (Count 2, R. 2). The subsequent colloquy demonstrates that the members of the Commission, and the Commission counsel, understood that appellant sought to claim the privilege (R. 50-51).

Appellant was given no statement of her position before the Commission until she had declined to answer eleven questions, which later became counts in the indictment against her. After the twelfth question, the Chairman said:

> "Chairman Renner: Mrs. Morgan, I should like to advise you under the Fifth Amendment, you are permitted to refuse to answer questions that might tend to incriminate you.
>
> "Mrs. Morgan: Yes.
>
> "Chairman Renner: But you are not permitted to refuse to answer questions simply for your own convenience. Counsel may proceed" (R. 52).

While waiting to be called as a witness, appellant had heard similar advice given to the prior witness (R. 62).

Appellant contended before the Ohio Supreme Court that this instruction by the chairman of the Commission constituted a kind of entrapment. This "glaring feature of the record" caused one Justice of that court to dissent in part from the affirmance of appellant's conviction (R.

136-139). The majority held that "the chairman obviously misstated the law" (R. 123).

The situation in which appellant found herself is similar to that involved in *Johnson* v. *United States,* 318 U.S. 189, and in *People* v. *DeFeo,* 308 N.Y. 595. In both cases, appellants relied upon erroneous advice given to them, as witnesses, by the questioning authority. DeFeo's conviction was reversed on this ground. Johnson's was affirmed on other grounds.

> "The ruling of the court gave the petitioner the choice between testifying and refusing to testify. * * * An accused having the assurance of the court that his claim of privilege would be granted might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one. * * * Elementary fairness requires that an accused should not be misled on that score. * * * " *Johnson* v. *United States, supra,* at 197.

Whether or not the Commission sought to entrap appellant, within the legal definition of that term, it is clear that the Chairman of the Commission acquiesced in appellant's refusal to answer the questions. Nothing was said during the hearing about the state immunity act, or its effect upon appellant's claim of the privilege.

As this Court has pointed out, fair play "is the essence of due process." *Galvan* v. *Press,* 347 U.S. 522, at 530. There can be no doubt that the action of the Commission did not constitute fair play within the meaning of the due process clause of the Fourteenth Amendment.

This is particularly true because the Commission gave no indication, during the hearing, that appellant's reason for refusing to answer the questions was rejected. No member of the Commission directed appellant to answer any ques-

tion, following her claim of the privilege, nor did the Commission's counsel give such a direction. "It was the policy of the commission not to press questions which we felt would be of an incriminating nature", according to the chairman of the Commission (R. 137).

In the absence of such directions, no wilful refusal can be found.

There is a presumption of innocence in every criminal case. A *presumptive intent* to commit a prohibited act has no place in a case such as this. See *Morissette* v. *United States*, 342 U.S. 246, at 275. Regardless of the wording of the contempt statute here, Sec. 12845 Genl. Code, it was necessary for the State to show an intention on appellant's part to defy the order of the Commission. No such showing having been made, this conviction must be reversed.

B. *The evidence does not support a finding that the questions asked were pertinent to the matter under inquiry.*

When this case came before this Court in the 1956 October Term, the conviction was vacated, and the cause remanded to the Ohio Supreme Court, for reconsideration in the light of this Court's decisions in the *Watkins* and *Sweezy* cases, cited *supra*. In those cases, this Court had carefully spelled out the requirement of pertinency in a legislative hearing in the field of "un-American activities": 1) the witness must be informed of the purpose of the hearing at which he appears; 2) he must be informed of the pertinency of the questions he is asked to a valid legislative purpose. The Court held that a contempt conviction cannot be based on refusal to answer questions unless such questions fall into the category of matters upon which the parent legislative body wishes to be informed. *Sweezy* v. *New Hampshire*, cited *supra*, 354 U.S., at 253-255; *Watkins* v. *United States*, cited *supra*, 354 U.S., at 205-6, 208-9.

In the instant case, the language of the statute establishing the Commission was appellant's only guide to the pertinency of the questions asked, since the chairman and counsel of the Commission made no statement concerning the scope of the hearing at the opening of the session at which appellant appeared, or just prior to her appearance (R. 49). It is clear that the witness, during the hearing, could not have been able to judge, with the degree of explicitness and clarity required by the due process clause, whether the questions asked were pertinent to the matter under inquiry, as set forth in the statute. See, for example, Counts 4, 13, 14, 17, 18, 28, 31, 32, 33, and 34, relating to appellant's length of residence in the County, financial and organizational problems of the Communist Party, appellant's employment record, and a petition to the United Nations published by the Civil Rights Congress (R. 2-5).

These questions, like those criticized in the *Watkins* decision, radiated outward infinitely to any topic thought to be related in some way to armed insurrection, with a probe for a depth of detail even farther removed from any basis of legislative action and involving an attempt to collect and confirm minutiae on remote topics in the past.

The trial court held that three of the questions asked appellant were not pertinent to the matter under inquiry. Counts 2, 29 and 35 (R. 87). The court did not discuss its findings that the other questions were pertinent (R. 89).

In addition, four of the five counts on which appellant was fined for refusal to answer involved questions which were purely preliminary, concerning appellant's residence, citizenship status, length of residence in Franklin County, and place of employment (Counts 1, 3, 4 and 5, R. 2). There is no indication that the Ohio General Assembly sought answers to these questions, or could use such answers in any way in its preparation of proposed legislation. (See

confession of error by United States Department of Justice in *Wollam, Simpson and McKenzie* v. *United States*, and summary reversal of contempt convictions therein, 355 U.S. 7.)

One aid to this reviewing Court, not available in the *Watkins* and *Sweezy* cases, is the action of the General Assembly, first in discontinuing the operation of the Commission after less than three years, and second, in providing that the substitute agency for investigating "un-American activities" should operate through the grand jury procedure, should not publicly seek or disclose information about individuals, but should concentrate on possible indictments for violation of the state sedition laws. (Report of the Un-American Activities Commission, State of Ohio, 1953-1954, cited *supra*, at 9, 25 and 33.)

For these reasons, it is clear that the evidence does not support a finding that the questions asked were pertinent to the matter under inquiry.

C. *The evidence supports a finding that appellant was asked only one question, and that in an area protected by the First and Fourteenth Amendments, and outside the jurisdiction of the State of Ohio.*

One of the contentions of appellant, first raised at the time of trial, was that the indictment did not state 37 separate offenses because all of the questions which were not purely preliminary (discussed *supra*), related to a single area: appellant's alleged political activities and associations (Counts 6, 8-27, 30, 31-34, and 37). The trial court agreed with this contention to the extent of acquitting appellant on two counts because of their repetitious nature (Counts 7 and 36, held to be identical with Count 6, R. 92).

This Court has recently held that, "where a witness draws the lines of refusal * * * by declining to answer ques-

tions within a generally defined area of interrogation, the prosecutor cannot multiply contempts by further questions within that area * * * " *Yates* v. *United States*, 355 U.S. 66. A similar rule must apply to legislative hearings.

This single area of questions, however, is one protected by the First and Fourteenth Amendments (discussed *supra* at point Ib), and is outside the jurisdiction of the State of Ohio (discussed *supra* at point Ia). Therefore, appellant's refusal to answer in this area did not constitute a wilful violation of Sec. 12845 Genl. Code, and the contempt conviction must be reversed.

CONCLUSION

Unlike the legislative committee in the *Watkins* case and the attorney general in the *Sweezy* case, the Commission in the instant case recommended its own demise, and the Assembly which had created it agreed to this conclusion. Like petitioner in *Watkins*, appellant herein declined to answer questions which named other persons as members of the Communist Party. Like *Sweezy*, appellant was not considered a "cooperative witness" by the investigating body. And, like him, she filed with the Commission a statement giving her reasons for refusing to answer questions concerning her political beliefs and affiliations and stating her opposition to investigations such as the one then being conducted by the Commission.* Like *Emspak*, *Bart* and *Quinn*, appellant declined to answer all questions concerning the Communist Party and her alleged relationship to it. Like *Simpson*, appellant claimed her privilege against self-incrimination in declining to answer preliminary questions

* In other respects, such as the clarity, style and tone of the writing, the statements were, of course, as different as the vocational backgrounds of the two witnesses.

concerning her address, etc. Like them, her conviction for contempt should be reversed.

The decision of the Ohio Supreme Court should be reversed with instructions to dismiss the proceedings.

Respectfully submitted,

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APPENDIX

An Act

To enact supplemental sections 76-28 to 76-35, inclusive, of the General Code, to provide for the establishment of a subversive activities commission in Ohio to be known as the un-American activities commission and to prescribe its powers and duties, to make an appropriation.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That sections 76-28 to 76-35, inclusive, of the General Code, be enacted to read as follows:

G.C. Sec. 76-28. There is hereby created an un-American activities commission in the legislative branch of the government, consisting of six members of the Senate and six members of the House of Representatives, to be appointed by the president pro tem. of the Senate and the speaker of the House of Representatives, respectively, before the sine die adjournment of the 99th General Assembly. The president pro tem. of the Senate and the speaker of the House shall be members and shall appoint as members of the commission five additional members in each house, not more than three of whom shall be members of the same political party. When a vacancy of the membership of the commission occurs it shall be filled in the same manner as the original appointments.

G.C. Sec. 76-29. The commission shall meet not later than ten days after the effective date of this act and organize by selecting from its membership, a chairman, a vice chairman, and a secretary. The members of the commission shall serve without compensation but shall be reimbursed for their actual and necessary expenses incurred in the discharge of their official duties.

G.C. Sec. 76-30. The commission shall employ and fix the compensation of a legal director who shall em-

ploy, with the approval of the commission, such assistants, stenographers, clerks, and engage the services of such professional investigators or technical advisors as the commission may deem necessary to carry out the objects and purposes of section 76-31 of the General Code.

The salaries and all expenses incurred by the commission shall be paid from the state treasury upon the warrant of the auditor of state by voucher approved by the chairman.

G.C. Sec. 76-31. The commission shall have the power and duty

(1) To investigate, study and analyze

(a) all facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means;

(b) all facts concerning persons, groups and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government or the industrial potential of this state;

(c) the operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated above and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

(2) To maintain a liaison with any agency of the federal, state or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage or threats of the same.

In addition thereto the commission shall have such additional rights, duties and powers as may be necessary to enable it fully to exercise those specifically set forth herein and to accomplish its lawful objectives and purposes.

G.C. Sec. 76-32. In the discharge of any duties imposed by sections 76-28 to 76-35 inclusive, of the Revised Code, the chairman shall have the authority throughout the state to administer oaths, to issue subpoenas compelling the attendance of witnesses and the production of any papers, books, accounts, records, documents and testimony, and to cause the deposition of witnesses either residing in or without the state. In case of disobedience on the part of any person to comply with a subpoena issued on behalf of the commission or on the refusal of any person or officer to testify to any matters regarding which he may be lawfully interrogated, or to conform to the provisions of section 12137 of the General Code, the chairman may be authorized by a majority of the members sitting at the time the alleged offense is committed, to cause a proceeding for contempt to be filed and prosecuted in the common pleas court of any county under the provisions of sections 12138 to 12146, inclusive, of the General Code. Each witness appearing before the commission by its order, other than a state official or employee, shall receive such compensation as the commission may direct and mileage in the amounts provided by section 3014 of the General Code. Fees shall be authorized and paid after a notation has been made on the proper voucher sworn to by such witness and approved by the chairman of the commission.

G.C. Sec. 76-33. Each officer, board, commission, or department of the state government or of any local government shall make such studies as the commission may require within the limitations of its budget and shall furnish the commission all such assistance, information, records, and documents as it may require for the accomplishment of its duties. Reports and recommendations resulting from such studies shall be pre-

sented to the commission at least within sixty days prior to the regular session of the 100th General Assembly.

The commission may require the services of the bureau of code revision, judicial council, legislative reference bureau, legislative research commission, the Ohio program commission, and such other departments and agencies as it shall deem necessary to prepare a program of legislation, provided by section 76-31 of the General Code.

G.C. Sec. 76-34. The commission shall meet as often as is necessary to perform its duties, provided that in any event it shall meet at least once each quarter. Five members shall constitute a quorum, and the majority thereof shall have authority to act on matters within the jurisdiction of the commission. The commission shall formulate such rules of procedure and policies to be followed in the performance of its duties and functions as it may deem necessary and appropriate. The chairman shall have authority to appoint sub-committees, consisting of not less than three members of the commission, which shall have all of the powers conferred upon the commission itself by this act and such specific duties as may be assigned to them. A majority of each sub-committee shall constitute a quorum. The chairman of any sub-committee shall have all of the powers conferred herein upon the chairman of the commission.

G.C. Sec. 76-35. The commission shall keep minutes of each meeting or hearing and a record of all testimony and evidence submitted to it. It may make such reports, findings, and recommendations, based upon its investigations and studies, as from time to time it may deem advisable and necessary to the people, the members of the 99th General Assembly, individually or in any special session thereof, and to the governor. It shall complete its work by and render a final report of its activities and of its recommendations to the 100th General Assembly and to the governor on January 1, 1953, at which time all of its records, books,

documents, and other property shall be committed to the clerk of the Senate of the 100th General Assembly. Any member of the General Assembly or the governor shall have the right to attend any sessions of the commission, and may present his views on matters which the commission may be considering.

SECTION 2. There is hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund and not otherwise appropriated the sum of fifty thousand dollars for the biennium beginning July 1, 1951, and ending June 30, 1953, to the commission hereby created.